STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 10, 2005
v	No. 252726 Wayne Circuit Court
ROBERT EDWARD CRAIG, Defendant-Appellant.	LC Nos. 03-006735-01 03-010358-01

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Following a jury trial, defendant, the live-in boyfriend of Patricia Tucker, was convicted of six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration of victim under thirteen), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with victim under thirteen), for acts against Tucker's older daughter, T.R. He was also convicted of one count of CSC II, MCL 750.520c(1)(a), for an act against Tucker's younger daughter, T.T. The trial court sentenced defendant to life imprisonment for each of the CSC I convictions, and ten to fifteen years' imprisonment for each of the CSC II convictions, all sentences to be served concurrently. Defendant appeals as of right. We remand for resentencing with respect to the CSC I convictions, but affirm in all other respects.

At trial, T.R. testified that when she lived with defendant and her mother, defendant penetrated her vagina with his fingers on more than one occasion,[1] put his penis into her vagina on more than one occasion, once asked her to "suck" his penis, which she did, forced her to touch his penis with her hand, and licked her breast with his tongue. Medical evidence was consistent with a history of multiple penetrations. T.T., who was defendant's natural daughter with Tucker, testified that defendant rubbed her genitals with his hand through her pajamas.

[1] The victim referred to her vagina as the "private" part that "pee" comes out of when going to the bathroom.

I

Defendant first argues that statements made by T.R. to Kiku Johnson were inadmissible hearsay, and that the admission of those statements through Johnson violated his rights under the Confrontation Clause.

At trial, Johnson testified over a hearsay objection that while she was driving T.R. home from a conference on November 9, 2002, T.R. expressed that she was glad she did not have to attend a sex workshop that was presented that day. Because Johnson noticed that T.R. disengaged from the conversation after making her statements, she asked why T.R. felt relieved not to attend the sex workshop. After asking Johnson to promise not to tell anyone, T.R. stated that defendant had talked to her about her "private" parts and about sex, but T.R. did not disclose that defendant had harmed her sexually or physically.

Johnson additionally testified that within several days of the conversation in her automobile, she took T.R. to dinner and raised the subject of their previous conversation. At that point, T.R. provided more details to Johnson about her relationship with defendant. Johnson subsequently arranged a meeting between Tucker, T.R., and a social worker. At the meeting, T.R. repeated the information of a sexual nature concerning defendant that she previously had shared with Johnson. Following that meeting, T.R. and the police had a conversation the subject of which was of a sexual nature, during which T. R. talked about defendant. Johnson did not testify about the substance of T.R.'s actual statements, except for those made on November 9, 2002.

The prosecutor argued that Johnson's testimony was not hearsay because it was not offered to prove the truth of the matter asserted therein. Rather, the testimony was elicited to rebut defendant's theory that T.R. fabricated the allegations because she wanted attention and wanted to move away from the apartment where she resided with defendant, her mother, and her sister. The prosecutor argued that defendant's fabrication theory was negated by information that T.R. did not reveal inappropriate touching or contact at first, and that she did not want anyone but Johnson to know about her disclosure. The prosecutor argued MRE 803(3) as an alternative ground for admitting T.R.'s statements. With respect to the statements made on November 9, 2002, the trial court found them admissible under MRE 803(3).[2]

We agree with the prosecutor that the challenged statements were admissible for a non-hearsay purpose. Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

[2] MRE 803(3) excludes the following statements from the hearsay rule:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

MRE 801(c). A statement includes "an oral or written assertion." MRE 801(a). T.R.'s question whether Johnson would promise not to tell anyone was not an assertion because the question is incapable of being judged true or false. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204-205; 579 NW2d 82, mod 458 Mich 862 (1998). Although the additional statements made by T.R. on November 9, 2002 were assertions, specifically that defendant had talked to her about her private parts and sex, those statements were not offered to prove that defendant had talked to the victim about sex or her "private" parts. Rather, the statements were offered to assist the prosecutor in rebutting the defense's fabrication theory by showing that T.R. was not initially willing to reveal the extent of defendant's conduct. Because T.R.'s statements from November 9, 2002 were not offered for their truth, it is unnecessary to find a hearsay exception as a prerequisite for their admission. We conclude that the trial court did not abuse its discretion by admitting the challenged testimony, although we rely on a different reason than that articulated by the trial court. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003); *People v Lucas*, 188 Mich App 554, 577; 470 NW2d 460 (1991).

With respect to Johnson's additional, vague references to T.R.'s subsequent revelations of a sexual nature involving defendant, in light of T.R.'s own properly admitted testimony concerning defendant's acts of sexual abuse, we cannot conclude that the admission of Johnson's vague testimony occasioned error that affected the outcome of defendant's trial. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003).

We reject defendant's unpreserved claim that the admission of T.R.'s out-of-court statements violated the Confrontation Clause. The right of confrontation ensures that a witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness. *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001), quoting *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994) (opinion by Brickley, J). The admission of a declarant's out-of-court statements at trial does not violate the Confrontation Clause as long as the declarant testifies as a witness and is subject to full and effective cross-examination. *People v Malone*, 445 Mich 369, 382-385; 518 NW2d 418 (1994), citing *California v Green*, 399 US 149; 90 S Ct 1930; 26 L Ed 2d 489 (1970); see also *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999) (explaining that "when witnesses are present at trial and could be cross-examined about their statements," they "are 'available' for cross-examination within the meaning of the Confrontation Clause"). In this case, T.R. was available for cross-examination about her prior statements, notwithstanding that defendant chose not to cross-examine her about those statements. *Id.* at 283 n 4.

Finally, defendant alternatively argues that, even if the challenged statements were permissible under the hearsay rules and the Confrontation Clause, they should have been excluded under MRE 403. This issue is not properly before this Court because it was not raised in the statement of the questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Moreover, the issue was not preserved below and, after reviewing the record, we conclude that defendant has not met his burden of establishing plain error requiring reversal. *Carines*, *supra*. While Johnson's testimony regarding T.R.'s statements arguably prejudiced defendant to some degree, he has not met his heavy burden of demonstrating the existence of *unfair* prejudice. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, mod 450 Mich 1212

(1995); *People v Houston*, 261 Mich App 463, 467-468; 683 NW2d 192 (2004), lv granted ___ Mich ___ (11/4/04).

II

Defendant next argues that resentencing is required because the life sentences for his CSC I convictions impermissibly departed from the minimum range under the legislative sentencing guidelines.

According to MCL 769.34(3), the trial court is required to impose a sentence within the recommended guidelines range unless the court has a substantial and compelling reason to depart from that range. *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). The phrase "substantial and compelling reason" means an objective and verifiable reason that keenly or irresistibly grabs the court's attention, is of considerable worth in deciding the length of the sentence, and exists only in exceptional cases. *Id.* at 257-258, 272. The trial court must articulate a substantial and compelling reason for the particular departure made, and it must explain why the reason justifies *that* departure. *Id.* at 258-260, 272. The trial court cannot premise a departure from the guidelines "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

This Court reviews a trial court's finding concerning the existence or nonexistence of a particular sentencing factor for clear error, but considers de novo the legal determination whether a particular factor qualifies as objective and verifiable. *Id.* at 264-265, 273. This Court reviews for an abuse of discretion a trial court's determination that an objective and verifiable factor is a substantial and compelling reason justifying departure from the statutory minimum sentence range. *Id.* at 264-265, 274. Where the trial court articulates several reasons for a departure and this Court determines that some of the reasons are substantial and compelling while others are not, we must determine whether the trial court would have departed from the range, and departed to the same degree, on the basis of the substantial and compelling reasons alone. *Id.* at 260, 273.

In this case, the trial court departed from the sentencing guidelines range of 126 to 210 months and imposed a sentence of life imprisonment for each of defendant's six CSC I convictions. The court filed a written departure evaluation explaining as follows:

> Defendant was convicted by a jury of six counts of CSC 1 - penetration - victim under age 13. In this case the victim was the step daughter of defendant and eleven years old at the time of the offense. She is of small stature and looked to be younger than her chronological age. The victim was and remains terrorized by the defendant's mere presence and fears him being released from prison. Currently the victim and her half sister (defendant's natural daughter [age 8]) live with a legal guardian. The sister was also victimized by defendant, and he was convicted of CSC 2 as to his own daughter. Both of these children will require extensive psychiatric or psychological counselling [sic] in the future and have nightmares about the defendant. His guidelines were 126 mos [sic] to 210 months on the minimum end. The living conditions under which the victims were forced to live were deplorable. Defendant's conduct in this case is utterly intolerable in a

> civilized community. The victim is mentally and emotionally scarred for the rest of her life.[3]

Our review of the many reasons given by the trial court for departing from the minimum guidelines range applicable to the CSC I convictions leads us to conclude that we must remand for further explication by the court. We initially observe that although some factors cited by the trial court qualify as substantial and compelling reasons justifying departure in light of the record, specifically (1) the youth of the victim, T.R., (2) the relationship between defendant and T.R., his stepdaughter, (3) the fact that defendant also victimized his own daughter, T.R.'s half sister, and (4) that T.R. will require extensive psychological counseling for the rest of her life, the court already had taken these factors into account at least to some degree by its scoring of several offense variables, MCL 777.34, MCL 777.39, and MCL 777.40. MCL 769.34(3)(b) While the trial court may still rely on these factors if it explains why in this case the guidelines give them inadequate weight, *Babcock*, *supra* at 272, the court has offered no such explanation.[4]

We also observe that at least two factors relied on by the trial court fail to meet the definition of substantial and compelling reasons for departure: the reason that defendant's conduct was "utterly intolerable in a civilized community" does not qualify as objective and verifiable, and the fact that T.R. and T.T. live with a guardian does not amount to a reason that irresistibly grabs our attention and is of considerable worth in deciding the length of defendant's sentence. *Id.* at 257-258, 272. The remaining factors to which the trial court referred, T.R.'s

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[3] At the sentencing hearing, the trial court explained as follows its reasons for departure:

> First, there are six Counts of criminal sexual conduct first degree, person under thirteen, that the Defendant stands in front of this Court convicted of by the jury. These crimes and the circumstances as the jury found to exist, there are not words sufficient to express how deplorable they are.
>
> A person in your position, Mr. Craig, with respect to these very young children, there is no excuse for this kind of conduct that the jury found you guilty of. It's totally and completely intolerable in a civilized society. I am compelled by these circumstances to sentence you to life imprisonment on these charges, Counts I through VI.

[4] For example, MCL 777.39 does not specifically take into account that additional victims like T.T. had a relationship of trust with the defendant. Furthermore, MCL 777.40 assigns ten points when the "offender exploited a victim's . . . youth or agedness, *or* a domestic relationship" (emphasis added), the OV apparently does not take into account that in this case defendant apparently took advantage of T.R.'s youth *and* his status as T.R.'s stepfather, or that defendant likewise took advantage of his own young daughter by victimizing her sexually. But we cannot determine on the basis of the record whether the trial court found the guidelines inadequate in these manners in this case, or whether and why these inadequacies would warrant the imposition of a departure to the extent of a life sentence in this case. *Babcock*, *supra* at 262-264, 272.

youth, her ongoing struggle with fears and terror of defendant,[5] and defendant's failure to provide the children a suitable home environment[6] are objective and verifiable on the record and may be of some worth in determining defendant's sentence. *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001) (approving the trial court's consideration of the effect on a child sex abuse victim and his sister from learning about sexual matters at a young age, which factor the Court viewed as distinct from the psychological injury contemplated in MCL 777.34). But because we cannot determine whether (1) the trial court felt several factors were not appropriately weighted by the sentencing guidelines, or (2) the court would depart to the same degree on the basis of the substantial and compelling reasons we have noted, we "must remand the case to the trial court for . . . rearticulation of its substantial and compelling reasons to justify its" upward departure from the sentencing guidelines applicable to defendant's CSC I convictions. *Babcock*, *supra* at 260-261.[7]

III

Defendant additionally challenges the propriety of his CSC II sentences. First, defendant argues that a sentence information report (SIR) should have been completed for the CSC II convictions. Where a single offender is convicted of multiple offenses and the sentences will be served concurrently, an SIR must be prepared only for the offense in the highest crime class. MCL 777.21(2); MCL 771.14(2)(e); see also Michigan Sentencing Guidelines Manual (2003 ed), p 1. Here, the trial court consolidated both victims' cases as one for trial and sentencing purposes. Before sentencing, an SIR that included sentencing guidelines was completed for the

[5] With respect to T.R.'s terror of defendant and fear of his release from jail, these factors are objective and verifiable on the record. The record reveals that at trial, T.R. expressed a fear of telling the truth because she believed she would anger defendant. The victims' legal guardian testified that after T.R. came to live with her, she had nightmares every night and would wake up screaming, "he's killing me, he's killing me, he's got a knife". At sentencing, the guardian informed the trial court that T.R. "still wakes up screaming at night because she fears that" defendant is "going to come and kill her," and indicated that she has to try to reassure T.R. that defendant will not be able to hurt her again.

[6] Trial testimony indicated that although the apartment where the victims lived with defendant and their mother had a bathroom, three bedrooms, a living room, a stove or hotplate, and three televisions, the apartment lacked a kitchen; the victims often had to eat cold food, and enjoyed eating hot food at a children's mental health center. According to the victims' current legal guardian, both victims suffered from educational neglect when they came to live with her: T.R. previously had performed poorly in school, appeared not to know a lot, and was two grades behind other children her age, while T.T. could not read at eight years of age. Both children had emotional problems, including attention deficit hyperactivity disorder. Under these circumstances, we cannot conclude that the trial court clearly erred in characterizing the victims' living conditions as "deplorable." *Babcock*, *supra* at 264-265, 273.

[7] Because we must remand for resentencing, we need not address defendant's alternative argument that the life sentences are disproportionate.

CSC I offenses, which occupied the highest crime class of offenses for which defendant was convicted. Because the court ordered all of defendant's sentences to run concurrently, and an SIR was completed for the highest class CSC I offenses, the court need not have arranged for the completion of an SIR for the lesser CSC II offenses.

Defendant also argues that his ten- to fifteen-year sentences for CSC II are disproportionate and were not individualized. We need not address the proportionality and individuality issues because any errors in the CSC II sentences are harmless. The minimum sentencing guidelines range calculated for the CSC I convictions was 126 to 210 months. Even if on remand defendant ultimately receives sentences at the lowest end of this guideline range, the concurrent, ten-year minimum sentences for the CSC II convictions still will be encompassed by the greater CSC I sentences.[8] *People v Hill*, 221 Mich App 391, 396; 561 NW2d 862 (1997). this Court explained that, where sentences are to be served concurrently, the sentence for the most severe offense will encompass the sentences for any lesser offenses.

Because we affirm defendant's CSC I convictions, and the sentences for the lesser CSC II crimes will run concurrently with and be encompassed by the greater CSC I sentences for the greater crimes and are consumed by those sentences, "even if we concluded that the [CSC II] sentence was disproportionate, no relief would be afforded." *People v Turner*, 213 Mich App 558, 584; 540 NW2d 728 (1995), disapproved on other grounds in *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001).

We affirm defendant's CSC I and CSC II convictions, but remand for resentencing on the CSC I convictions. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White

[8] Neither party has argued, and the record does not reveal, any substantial and compelling reasons that would support a downward departure from the guidelines range applicable to the CSC I convictions. Thus, any minimum sentence imposed by the trial court for the CSC I convictions will exceed the ten-year minimum sentences imposed for the CSC II convictions.